No. 15747

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JESUS ARRELLANO-FLORES,

Appellant,

vs.

ALBERT DEL GUERCIO, District Director of Immigration and Naturalization Service at Los Angeles, California,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement of Jurisdiction.

Appellant filed his Complaint for Declaratory Judgment and Judicial Review on or about February 5, 1957.[1] An Answer was filed on March 29, 1957. The action came on for trial on May 6, 1957 before the Honorable William M. Byrne, District Judge, who rendered judgment in favor of appellee on June 14, 1957.

Appellant filed a timely Notice of Appeal on June 27, 1957.

The District Court had jurisdiction of the action under 5 U. S. C. Sec. 1009; 8 U. S. C. Sec. 1329; and 28 U. S. C. Sec. 2201, *et seq.*

This Court has jurisdiction of the appeal under 28 U. S. C. Sec. 1291.

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[1]No reference can be made to the transcript of record since none has been prepared at the present time.

Statement of the Case.

Although no Specification of Errors has been set forth in the Appellant's Opening Brief,[2] two points only seem to be raised by appellant. The first is that since no final judgment of conviction has occurred in the State court proceeding, appellant has not been "convicted" within the meaning of 8 U. S. C. Sec. 1251(a)(11). The second is that appellant was denied due process by reason of his attorney being given only 48 hours within which to file an application for suspension of deportation. These points arose in the following manner.

On or about May 10, 1956, appellant was served with an Order to Show Cause before a Special Inquiry Officer of the Immigration and Naturalization Service why he should not be deported pursuant to 8 U. S. C. Sec. 1251(a)(11), in that he had been convicted on March 9, 1956 of a violation of law governing and regulating the sale of marihuana. A deportation hearing was held on May 18, 1956 and June 5, 1956 pursuant to the Order to Show Cause. On June 15, 1956, the Special Inquiry Officer determined that appellant was subject to deportation. The Officer also denied the discretionary relief of suspension of deportation under 8 U. S. C. Sec. 1254(a), finding that appellant was ineligible therefor, since he could not establish the necessary requirement of seven years continuous residence within the United States immediately preceding the application for suspension.

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[2]Thus this Court need not consider the points raised on appeal. (*Lee v. United States,* 238 F. 2d 341, 344 (C. A. 9, 1956) (and see cases cited at footnote 15 therein).)

An administrative appeal was taken from the decision of the Special Inquiry Officer and on September 14, 1956, the Board of Immigration Appeals affirmed the lower decision by dismissing the appeal. Accordingly, a Warrant of Deportation was issued by the District Director on September 20, 1956.

ARGUMENT.

I.

Appellant Was Convicted Within the Meaning of Section 1251(a)(11).

There is no dispute as to the facts. Appellant was found guilty on March 9, 1956 of having violated California Health and Safety Code Section 11500 in that on September 17, 1955 he unlawfully sold marihuana. Appellant does not question that a conviction of Section 11500 would constitute a conviction within the meaning of 8 U. S. C. Sec. 1251(a)(11). What appellant contends is that no conviction under the State charge occurred.

The basis for appellant's argument lies in the peculiar California system of sentencing. After the guilty finding of March 9, 1956, the Superior Court judge imposed the following sentence: proceedings were suspended and probation was granted for five years upon the condition, *inter alia*, that appellant serve one year in the County Jail. Under California law, where imposition of sentence upon a defendant has been suspended, no final judgment exists upon which an appeal may be predicated.

People v. Guerro, 22 Cal. 2d 183, 137 P. 2d 21 (1943);

In re Marquez, 3 Cal. 2d 625, 627, 45 P. 2d 342 (1935).

Nevertheless, California law considers that such a defendant has been "convicted".

In re Marquez, supra;

In re Phillips, 17 Cal. 2d 55, 109 P. 2d 344 (1941);

People v. Christman, 41 Cal. App. 2d 158, 160, 106 P. 2d 32 (1940).

Thus in California, a defendant is "convicted" upon his plea of guilty or finding of guilt, it being immaterial whether a judgment of conviction is final.

People v. Ward, 134 Cal. 301, 307-308, 66 Pac. 372 (1901);

Ex parte Brown, 68 Cal. 176, 8 Pac. 829 (1885);

In re Morehead, 107 Cal. App. 2d 346, 350, 237 P. 2d 335 (1951);

See *People v. Acosta,* 115 Cal. App. 103, 107, 1 P. 2d 43 (1931);

Cf. People v. Dail, 22 Cal. 2d 642, 652, 140 P. 2d 828 (1943);

Cal. Pen. Code, Sec. 689.

Appellant cites *United States ex rel. Freislinger v. Smith,* 41 F. 2d 707 (7th Cir. 1930), as authority for the proposition that "one is not convicted of a crime unless there is a valid and final 'judgment of conviction.'" The *Freislinger* opinion stated that the issue was whether the appellant therein had been "convicted". In determining that issue, it was held that the law of the place where the alleged conviction occurred would control. Under the law of the State in question, Illinois, a final judgment of conviction was necessary in order that a conviction occur. Therefore the Court held that since

no final judgment of conviction had occurred, the appellant therein had not been "convicted" as defined by Illinois law, and thus not convicted within the meaning of the immigration laws.

Illinois law does not control here. If it is true that the law of the place of the alleged conviction controls, as *Freislinger* holds, then it is clear that appellant was "convicted" within the meaning of Section 1251(a)(11), as he is considered convicted under California law.

In order to exhaust all possibilities, we shall consider what the result would be if federal law controls the meaning of the word conviction. An examination of the law reveals that federal courts long have considered a defendant convicted upon a finding of guilt, even though the judgment is not final.

> *Berman v. United States,* 302 U. S. 211, 212-213 (1937);
>
> *Bridges v. United States,* 199 F. 2d 845 (C. A. 9, 1953).

In *United States v. Watkins,* 6 Fed. 152, 158 (Cir. Ct. Ore. 1881), it was stated:

> "In the argument for the defendant it has been assumed that 'conviction' of a crime includes and is the result of the judgment or sentence of the court imposing the punishment prescribed therefor. But this is altogether a mistake. The term conviction, as its composition (*convinco, convictio*) sufficiently indicates, signifies the act of convicting or overcoming one, and in criminal procedure the overthrow of the defendant by the establishment of his guilt according to some known legal mode. These modes are, (1) by the plea of guilty, and (2) by the verdict of a jury.
>
> * * * * * * * *

"Bishop, Statutory Crimes, §348, says:

'The word conviction ordinarily signifies the finding of the jury, by verdict, that the prisoner is guilty. When it is said there has been a conviction, or one is convict, the meaning usually is not that sentence has been pronounced, but only that the verdict has been returned. So a plea of guilty by the defendant constitutes a conviction of him.'"

In *United States v. Gilbert,* 2 Sum. 19, 40, Mr. Justice Story stated:

"And here, in order to avoid ambiguity, it may be proper to state that conviction does not mean the judgment passed upon the verdict; but if the jury find him (the party) guilty, he is then said to be convicted of the crime whereof he stands indicted."

In *Kerchoval v. United States,* 274 U. S. 220, 223 (1927), the Supreme Court stated:

"A plea of guilty . . . is itself a conviction. . . . More is not required; the Court has nothing to do but give judgment and sentence."

In *United States v. Hudson,* 65 Fed. 68, 75 (D. C. Ark., 1894), the following language appears:

"Conviction means after verdict of the jury."

Thus it would appear very clear that whether California or federal law applies to the construction of the term "conviction" in Section 1251(a)(11), the appellant has been convicted. It should be noted that the statute itself does not use the term "final judgment of conviction" but only the well-accepted common law term which, by

statutory construction, must be taken to have its common law significance.

Barber v. Gonzales, 347 U. S. 637, 641 (1954).

The intention of Congress is doubly made clear when we consider that the predecessor statute to Section 1251 (a)(11), 8 U. S. C. Sec. 156a, enacted on February 18, 1931, contained the requirement that an alien be "convicted *and sentenced.*" The elimination of the italicized words by the June 28, 1940, as well as in the 1952 Immigration and Nationality Act, shows that sentence or a final judgment of conviction is not required by the Section in narcotic violation cases. In such cases, "conviction alone is sufficient to warrant deportation."

Ex parte Eng., 77 Fed. Supp. 74, 79 (D. C. Cal., 1948);

United States v. Watkins, 73 Fed. Supp. 399, 400-401 (D. C. N. Y., 1947).

Appellant has attached as an appendix to his brief an opinion of the Board of Immigration Appeals. What weight, if any, such opinion might have with this Court would seem to vanish when we consider that this same Board determined in the instant case that appellant is deportable. In other words, if this Court followed Board decisions, then necessarily it would be required to follow the instant Board decision with respect to the appellant.

II.

Limiting Time for Applying for Administrative Relief Was Not Error.

The second point raised by appellant is that it was a denial of due process to require his attorney to file an application for suspension of deportation within 48 hours. Whether or not the time allowed by the Special Inquiry Officer was insufficient is a point which we will not argue. The officer's time limitation was made

> "in view of the fact that the record establishes that the respondent is statutorily ineligible for the relief requested of suspension of deportation under 244(a) of the Immigration and Nationality Act.
>
> * * * * * * * *
>
> "The record clearly establishes that the respondent has not been physically present in the United States for a continuous period of not less than seven years immediately preceding the date hereof, and that, thereof [sic] any application for suspension of deportation must necessarily be denied." (Deportation Hearing of June 5, 1956.)

Not only would appellant not have been eligible for the relief requested by reason of his inability to establish the residence requirement of Section 1254(a), but also by his inability to establish good moral character, as is also required. No matter under which paragraph of 8 U. S. C. Sec. 1254(a) appellant sought relief, he was required to prove "good moral character".

Under 8 U. S. C. Sec. 1101(f)(7), the Immigration Service is precluded from finding good moral character of one who, during the period for which good moral character is required, has been confined to a penal institution for more than 180 days as a result of a conviction. The

service of one year in the County Jail by appellant would bar him from possessing the requisite good moral character.

Thus for two reasons, the desired application for suspension of deportation by appellant must have been denied. This the Special Inquiry Officer knew, and for that reason, he made the time limitation of which appellant complains. In view of such circumstances, the limitation was proper in order to prevent a frivolous delay of the proceeding. Even if the action were improper, no prejudice resulted to appellant because his application could not have been granted.

Conclusion.

No error appearing in the administrative hearing, the judgment of the District Court should be affirmed.

Respectfully submitted,

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